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In The

Supreme Court of the United States

October Term, 1975

No. 75-650

EARL L. KRAMER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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October, 1975

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In The

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October Term, 1975

No. .....

EARL L. KRAMER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, Earl L. Kramer, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on January 6, 1975.

OPINION BELOW

The opinion of the Court of Appeals, which has not yet been reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the District of Colorado.

—o—

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on January 6, 1975. A timely petition for rehearing was denied on October 2, 1975, and this petition for writ of certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

—o—

QUESTIONS PRESENTED

1. Is a defendant denied his right to confrontation or his right to a fair trial when, in a conspiracy prosecution, an incriminating hearsay declaration of an alleged co-conspirator is admitted into evidence and the declarant is never asked whether he made such a statement, although he testifies as a government witness?

2. Did the tactic of the prosecutor below, in introducing the hearsay declaration of an alleged co-conspirator but failing to inquire of the declarant, who testified as a government witness, whether he had made such a statement

constitute improper conduct on the part of the prosecution so as to warrant reversal of petitioner's conviction?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V, provides in pertinent part:

> "No person shall * * * be deprived of life, liberty, or property without due process of law; * * *."

Constitution of the United States, Amendment VI, provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; * * *."

STATEMENT OF THE CASE

Petitioner was charged in a two-count indictment filed in the District Court for the District of Colorado with having conspired (18 U. S. C. § 371) to violate 18 U. S. C. § 1001 by knowingly making or causing to be made a false representation in an application to the Small Business Administration for the guarantee of a bank loan to a potato company, and with having committed the substantive offense of making such a false statement. The trial court entered a judgment of acquittal as to the substantive count at the close of the government's case, and Petitioner was convicted by the jury on the conspiracy count. Upon direct appeal pursuant to 28 U. S. C. § 1291, the Court of

Appeals for the Tenth Circuit affirmed the judgment of the District Court.

The Court of Appeals interpreted the "rambling and prolix" indictment to charge Petitioner with conspiracy to violate 18 U. S. C. § 1001 by the making of false representations in an application to the SBA in either of two material facts, (a) the financial condition of the potato company, or (b) the intended purposes of the loan, i. e., that petitioner was to receive a portion of the proceeds. Appendix, at p. A-2. Two unindicted co-conspirators were also named in the indictment: Anthony Simeone, the company owner, and Jack Biggs, an SBA loan officer.

Testimony at trial showed that in August, 1970, Simeone and his accountant went to Kramer's home to formulate an application for an SBA loan guarantee in the amount of $180,000 to be loaned through Kramer's bank. There was evidence that Kramer suggested that certain assets and liabilities carried on the company books should be left out of the application because they did not directly relate to the potato business. The accountant testified that this was proper procedure, and he completed the actual application. The government attempted to show at trial that the removal of these assets and liabilities disguised the true value of the company and resulted in more favorable consideration of the application by the SBA than would have occurred had the application contained these items.

The accountant was not charged in the indictment, nor was he named co-conspirator. The Court of Appeals found that there was no evidence to suggest that Biggs had any knowledge or participation in the making of the applica-

tion, or that Petitioner had done anything with respect to the making of the application other than to suggest the legitimate procedure of leaving out certain items that did not relate to the potato business. While Simeone attended the August meeting and signed the application, he testified that he had relied upon the accountant for what was contained in the application. The Court of Appeals therefore held that there was no evidence to support a finding that two or more persons agreed to knowingly make or cause to be made false statements in the application concerning the financial condition of the company. Appendix, at pp. A-8 - A 9.

However, the Court of Appeals took a different view with respect to its alternative aspect of the conspiracy count, i. e., the misrepresentation of the intended purposes of the loan. There was evidence that after the proceeds of the loan were disbursed, Simeone sent a $15,000 check to Dant Slack, a potato dealer in Western Colorado and a creditor of Simeone. Several days after receiving the check, Slack obtained a $15,000 cashier's check and sent it by airplane to Simeone in Denver. Simeone cashed the check and gave the $15,000 in one hundred dollar bills, to Petitioner. The evidence showed that Petitioner deposited $7,000 in cash in his personal account and also purchased a $7,000 participation in the unsecured 10% of the SBA loan. This latter transaction was also completed in cash. The Court of Appeals held that these circumstances, coupled with the fact that the SBA application stated that the proceeds of the loan were for inventory capital and the purchase and maintenance of machinery and equipment (and made no mention of any participation by Petitioner), were sufficient to demonstrate an agreement to

misrepresent the intended purposes of the loan and to divert the proceeds. Appendix, at pp. A-9 and A-10.

The Court of Appeals was very troubled, however, by a government tactic at trial. The prosecutor was not content to rest on the above facts.[1] Slack testified, over vigorous objection, that Simeone told him that "he Simeone) said he had to give (Petitioner) $15,000 to get the loan." (Record on Appeal, vol. II, pp. 150-151.) Simeone was later called as a government witness, and though he testified that Petitioner may have mentioned to him that the loan might "cost something," he was never asked whether he had made the statement attributed to him by Slack. (Record on Appeal, vol. III, pp. 248-249.) The Court of Appeals recognized the danger of free application of the co-conspirator hearsay rule, but it nonetheless found that independent evidence of the conspiracy existed so that the hearsay statement of Slack was properly admitted. Appendix, at pp. A-10, A-11. At the same time, the court below stated that the tactic of the government in failing to ask Simeone whether the hearsay statement was true "betrays the truthfinding function of the prosecution, and we cannot condone it." The court still affirmed, for it could find no legal or ethical rule to condemn the tactic, and it did not consider the hearsay statement to be so prejudicial that it required reversal merely on that basis. Appendix, at p. A-12.

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1. Both parties focused at trial and on appeal on the first prong of the indictment as construed by the Court of Appeals. The prosecutor told the trial court that the money conveyed through Slack was not the crux of the charge, but rather the August meeting was the essence of the indictment. Record on Appeal, Vol. III, pp. 280-281.

REASONS FOR GRANTING THE WRIT

1. The decision below raises important questions concerning the administration of justice in conspiracy prosecutions.

The tactics of the assistant U. S. attorney below, in introducing the hearsay declaration of Simeone through Slack, and then failing to inquire of Simeone whether he had made such a statement, even though Simeone testified as a government witness, raise grave questions for the administration of justice in the federal courts. If such a tactic is allowed to go uncorrected, the scope of evidentiary exceptions in conspiracy prosecutions will be dangerously widened, and defendants' rights to confrontation and to a fair trial will be seriously jeopardized.

This Court has previously restricted the admissibility of hearsay declarations by a co-conspirator to those made in the course of and in furtherance of the conspiracy. *Lutwak v. United States*, 344 U. S. 604 (1953); *Krulewitch v. United States*, 336 U. S. 440 (1949). Furthermore, this

> "limited scope of the hearsay exception in federal conspiracy trials is a product, not of the Sixth Amendment, but of the Court's 'disfavor' of 'attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions.' *Grunewald v. United States*, 353 U. S. 391, 404." *Dutton v. Evans*, 400 U. S. 74, 82 (1970).

The hazard of loose applications of the rules of evidence, as warned against by Justice Jackson in *Krulewitch v. United States, supra*, at 453, is not lessened by the order of proof that often takes place in conspiracy

trials, where hearsay declarations, properly admitted only upon an independent demonstration of the existence of the agreement, often bootstrap the proof of the conspiracy itself, for trial courts are permitted discretion as to the order of proof.[2]

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2. While the trial judge must make a preliminary determination that there is substantial, independent evidence of the agreement, at least enough to establish a prima facie case, **United States v. Vaught,** 485 F. 2d 320, 323 (CA 4 1973); **United States v. Santos,** 385 F. 2d 43, 45 (CA 7 1967), cert. denied, 390 U. S. 954 (1968); **United States v. Morton,** 483 F. 2d 573, 576 (CA 8 1973); **United States v. Spanos,** 462 F. 2d 1012, 1014 (CA 9 1972); **Carbo v. United States,** 314 F. 2d 718, 737 (CA 9 1963), cert. denied 377 U. S. 953 (1964), the order of proof is left up to the trial court. The dangers of the order of proof problem have been pointed out by Justice Jackson in **Krulewitch v. United States, supra,** at 453:

> "(A) conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed."

See also Davenport, The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harv. L. Rev. 1378, 1389 (1972) (hereinafter referred to as "Davenport").

The dangers of this problem are present in this case. The trial court admitted Slack's hearsay account of Simeone's alleged statement that he had to give fifteen thousand dollars to Petitioner because the court felt that the agreement had been proved by the August, 1970 meeting at Petitioner's home. (Record on Appeal, vol. II, pp. 147-148.) Yet the Court of Appeals found that all Petitioner had done at the August meeting was to suggest the entirely proper procedure that certain items that did not directly relate to the potato business be removed from the SBA application. Appendix, at p. A-8. While the Court of Appeals did find sufficient evidence to establish a conspiracy, it did so because of evidence that Petitioner had told Simeone that the loan might "cost something," and because Petitioner was given fifteen thousand dollars by Simeone. However, this testimony did not occur until Simeone himself had

(Continued on next page)

The tactics below raise more than mere problems of the relaxation of the hearsay exception in conspiracy trials. Rather, the purposes of the Confrontation Clause would also appear to be threatened:

> "The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact (has) a satisfactory basis for evaluating the truth of the prior statement.' *California v. Green*, 399 U. S., at 161." *Dutton v. Evans, supra*, at 89.

Indeed, the basis of our system of justice is the full development of all relevant facts:

> "We have elected to employ an adversary system of criminal justice in which the parties contest all issues

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(Continued from previous page)

testified, several witnesses **after** Slack had testified. Slack did establish that Simeone had sent him a check for fifteen thousand dollars and that he returned the fifteen thousand, via a cashier's check, to Simeone. The only evidence to establish an agreement at the time Slack testified was the August meeting. Under these circumstances, it is difficult to see how anything but the following occurred:

> "There is a distinct possibility that the independent evidence and the conditionally admitted hearsay will bootstrap each other into legitimacy in the eyes of the jury, the hearsay lending credence to otherwise insufficient independent evidence, with the independent evidence then turning around and legitimizing the use of the hearsay." Davenport, **supra**, 85 Harv. L. Rev., at 1389.

Here, of course, this problem was compounded because the hearsay declaration was not even **conditionally admitted.** It was simply allowed to sit in the minds of the jurors and poison any possibility of an objective determination of whether the crime charged was in fact proved.

> before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence." *United States v. Nixon*, 418 U. S. 683, 709 (1974).

The two most recent interpretations of the Confrontation Clause by this Court are in *California v. Green*, 399 U. S. 149 (1970); and *Dutton v. Evans*, supra. In both cases this Court held that there was no violation of the Confrontation Clause, but those cases did not present the factual situation of the instant case.

California v. Green, supra, involved a statute which permitted the introduction of previous testimony without violation of the hearsay rule. This Court there stated that the Confrontation Clause is not congruent with the hearsay rule, 399 U.S., at 155-156, and it was held that the previous testimony there in question, which had occurred at a preliminary hearing, where the witness was under oath and cross-examination took place, was sufficiently reliable for constitutional purposes so as to allow its admission into evidence when the witness, who was present at trial, acknowledged that he had testified at the preliminary hearing and was subject to cross-examination at the trial. Unlike that situation, however, the declarant below was never asked whether he had made the statement to Slack. Under these circumstances, the admission of the hearsay statement was virtually tantamount to those cases in which the declarant is absent.

See, *e. g., California v. Green, supra,* at 161. Nor was Simeone under oath or subject to cross-examination at the time he allegedly made the statement to Slack. Finally, unlike the situation in *Green,* the prosecution did *not* make "every effort to introduce its evidence through the live testimony of the witness" Simeone. 399 U. S., at 167.

In Dutton v. Evans, supra, also a state prosecution, the hearsay statement of a non-appearing co-conspirator was admitted at Evans' trial. This Court held that the hearsay statement was admitted under circumstances that did not violate the Confrontation Clause because the statement carried no express assertion of past fact, thus affecting its weight, and its content was abundantly established by other testimony at the trial, including that of another co-participant, who testified under immunity on behalf of the state. 400 U. S. at 89. The hearsay statement was thus, in the opinion of the plurality, neither "crucial" nor "devastating." *Id.* at 87. Here, these indicia of reliability are abundantly lacking, particularly since the alleged declarant, Simeone, was present and testified as a government witness. It was the government's burden to produce this evidence, *id.* at 102 n. 4 (Marshall, J., dissenting), yet the prosecutor chose not to do so. Furthermore, the evidence was both "crucial" and "devastating." It was the crucial piece of evidence to establish the offense, namely the diversion of the loan proceeds. Had Simeone been questioned about the statement, then he could have been tested as to whether he in fact made it, what he meant by it, and whether it was true. The jury could then have evaluated these and other matters in light of Simeone's demeanor, and the truth-finding process would have been markedly aided.

Both *California v. Green, supra;* and *Dutton v. Evans, supra,* were decisions under the Confrontation Clause. This Court is free in this case to go beyond those decisions, if it wishes, and impose higher standards in federal trials under its supervisory powers in order to insure that trials are more fair and fully serve the truth-determining process.

It has been suggested that the reliability and probativeness of co-conspirator hearsay statements would be increased if the present rule were to be modified. See *Davenport, supra,* 85 Harv. L. Rev. at 1391-1407. In order to guard against the situation in the instant case, a declaration ostensibly against the declarant's penal interest or ostensibly an act of the conspiracy should be inadmissible to the extent it implicates someone other than the declarant in the criminal enterprise. Such a statement is lacking in indicia of reliability, for it could have been made to impress or brag, or could have been deliberately false. *Davenport, supra,* at 1396-1397, 1400-1401. The only way to insure the reliability of the statement is to question the declarant—which could have been very easily done here, since he was a government witness.

It is therefore submitted that in order to facilitate the search for truth and to afford defendants in similar situations their rights to confrontation and fundamental fairness, this Court should adopt a standard requiring that an available co-conspirator be the only source for the introduction of hearsay statements. Otherwise, as here, the prosecution will be permitted to broaden the already dangerous hearsay exception in conspiracy cases, and the truth-determining process will be undermined.

Because of the importance of this question to the administration of justice, and because of the likelihood of this problem recurring in other cases, this Court should grant the writ to review the judgment below.

2. The decision below raises important questions concerning the conduct of U. S. attorneys and defendants' rights to a fair trial.

This Court long ago held that due process prohibits the prosecution from taking any action that offends "fundamental conceptions of justice." *Mooney v. Holohan*, 294 U. S. 103, 112 (1935). *Accord, United States v. Ash*, 413 U. S. 300, 320 (1973). This Court also many years ago stated the ethical responsibilities of a federal prosecutor:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignity whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U. S. 78, 88 (1935).

The conduct of the Assistant U. S. Attorney below did not fulfill these requirements, and the effects of his

failure to ask Simeone, the declarant of the hearsay statement admitted through Slack, about the statement deprived Petitioner of his right to a fair trial.

It can be inferred from the failure of the prosecutor to ask Simeone about the statement that his response would not have been favorable to the government's case.

> "(A) party's failure to utilize a witness 'peculiarly within his power to produce * * * whose testimony would elucidate the transaction' permits an inferrence that the testimony would have been unfavorable." *Wynn v. United States,* 130 U. S. App. D. C. 60, 397 F. 2d 621, 625 (1967).

The inference is based not upon mere non-production or non-utilization of a witness, but rather upon "non-production when it would be natural for (a party) to produce the witness if the facts known by him had been favorable." 2 J. Wigmore, Evidence, § 286 (3d ed. 1940). *Accord, United States v. Malizia,* 503 F. 2d 578, 581 (CA 2 1974); cert. denied, 420 U. S. 912 (1975).

The inference is applicable here, for Simeone was a government witness. It is therefore fair to infer that Simeone could not have substantiated the statement that the money was for Petitioner in order to get the loan. This means that the conduct of the prosecutor was more than a "betray(al) (of) the truth finding function of the prosecution." Appendix, at p. A-12. Rather, it was a successful attempt to introduce improper evidence—a violation of the A. B. A. Standards for Criminal Justice Relating to the Prosecution Function § 5.6(b). In analogous circumstances, other Courts of Appeals have found viola-

tions of the standards of *Berger v. United States, supra.* See *United States v. Gullo,* 502 F. 2d 759 (CA 3 1974), where the government attorney improperly asked a witness whether he was aware that a co-defendant had pleaded guilty. When objection was made, the prosecutor promised to bring the co-defendant in as a witness. The trial court then gave a *sua sponte* instruction to the jury that the plea was not evidence of guilt of the other defendants. The defense then reluctantly called the co-defendant as a witness, and he repudiated, in an unconvincing manner, his guilty plea. While the Court believed the representation of the prosecutor that he did not know the question was improper, the Court still found a violation of the *Berger* standard. *Id.* at 762-763. See also *United States v. Harrell,* 436 F. 2d 606, 614-615 (CA 5 1970) (evidence of guilty plea by co-conspirator); *United States v. Calvert,* 498 F. 2d 409 (CA 6 1974) (evidence of prior criminal record of defendant when he did not testify and did not put his character in issue); *United States v. Perry,* 512 F. 2d 805, 806-807 (CA 6 1975) (attempting to prove misconduct on other occasions when not probative of particular offense and when defendant's character not in issue); *United States v. Grey,* 422 F. 2d 1043 (CA 6 1970) (injection of racial issue into bank robbery case).

In all the above circumstances the courts found the *Berger* standards to be violated. See also the commentary to the A. B. A. Standards, the Prosecution Function, § 1.1, at p. 44.

The hearsay statement involved here was crucial to the outcome of the case. The other evidence was hardly

"overwhelming;" rather, this was a close case, so the admission of the statement cannot be considered harmless error. Cf. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 239-240 (1940); *United States v. Bowen*, 500 F. 2d 41, 42 (CA 6 1974); cert. denied, 419 U. S. 1003 (1974). The jury was not given a cautionary instruction, nor was the statement conditionally admitted. Under these circumstances, it is clear that Petitioner was denied his right to a fundamentally fair trial. In order to insure the fairness of federal trials, this Court should grant the writ to review the judgment below, else other courts will be left with violations without remedies.

—o—

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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October, 1975

APPENDIX

Opinion and Judgment of Court of Appeals

United States Court of Appeals, Tenth Circuit

No. 74-1108

Filed January 6, 1975

United States of America,

Plaintiff-Appellee,

vs.

Earl L. Kramer,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Colorado
(D. C. No. 73-CR-238)

John W. Madden III, Special Assistant United States Attorney, Denver, Colorado (James L. Treece, United States Attorney, on the brief), for Plaintiff-Appellee.

Lawrence M. Henry, Denver, Colorado, for Defendant-Appellant.

Before Murrah, Seth, and Barrett, Circuit Judges.

Murrah, Circuit Judge.

Upon a trial to a jury appellant Kramer was convicted and sentenced on a charge of conspiracy (18 U. S. C. § 371) to violate 18 U. S. C. § 1001[1] by knowingly making or causing to be made false, ficticious and fraudulent representations in an application to the Small Business Administration for the guaranty of a bank loan to the Simeone Brothers Potato Company, Inc. As we read the rambling and prolix indictment, it alleges the making of false representations in the application as to material facts, to wit, (1) the financial condition of the Potato Company and (2) the intended purposes of the loan. It charges that these false representations caused the SBA to consider more favorably the guaranty of 90% of a $180,000 loan to the Potato Company by the First National Bank of Fleming, Colorado, of which Kramer was president; that, as part of the conspiracy, Kramer would receive $15,000 of the loan proceeds; and that his personal interest in these proceeds would be concealed from the SBA. Twenty-two overt acts are alleged in furtherance of the conspiracy between Kramer and two unindicted co-

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1. The statute in full reads: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

conspirators, company owner Anthony Simeone and SBA loan officer Jack L. Biggs.[2]

The Court's instructions were not brought forward on this record, and we shall proceed on the premise that they correctly stated the law of the case. Suffice it to say, for our purposes, that it was incumbent upon the government to prove to the satisfaction of the jury beyond a reasonable doubt that Kramer, Simeone, and Biggs formed an agreement, however clandestine or informal, to violate 18 U. S. C. § 1001 by the making of false representations in an application to the SBA concerning a material fact—i. e., either (1) the financial condition of the Potato Company or (2) the intended purposes of the loan;[3] and that someone committed an overt act in furtherance of this object. Kramer argues that the evidence was insufficient as a matter of law to support the finding of his guilt, especially in view of the erroneous admission of hearsay evidence.

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2. The second count of the indictment charged Kramer with the substantive violation 18 U. S. C. § 1001 by the same false representations in the application pertaining to the Potato Company's financial condition. The court directed a verdict on this count holding in effect that the evidence was insufficient to take the case to the jury on the substantive offense but sufficient on the conspiracy offense.

3. 18 U. S. C. § 1001 embraces in the disjunctive the s e p a r a t e offenses conjunctively charged in the indictment as one offense so that proof of a conspiracy to make a false representation in the application as to either the financial condition of the Potato Company or the intended purposes of the loan will warrant a conviction on this indictment. Turner v. United States, 396 U. S. 398, 420 (1970); United States v. Dinneen, 463 F. 2d 1036 (10th Cir. 1972); Troutman v. United States, 100 F. 2d 628 (10th Cir. 1938).

We are mindful that the government's case has survived motions to dismiss and for directed verdict for the insufficiency of the evidence by the rulings of an able and experienced trial judge. In this posture, we should not disturb the verdict unless convinced that the evidence, considered in its most favorable light, is wholly insufficient to take the case to the jury. See *United States v. Kramer*, No. 73-1925 (10th Cir. August 20, 1974).

This brings us to an analysis of the facts of record. In essential outline, the proof was to the effect that the Simeone brothers owned a number of closely knit incorporated businesses, one of which was a wholesale potato company. Apparently, the Simeones interchanged assets and liabilities between these corporate businesses as best suited their personal and business convenience.

Faced with a financial crisis in early 1970, the Simeones turned to their long-time friend and banker, Kramer. On several occasions, Kramer and the Simeones discussed the financial condition of the Company. Kramer indicated that he knew someone at the SBA and might be able to arrange an SBA loan guaranty. At some time during the discussions and negotiations Kramer told Simeone that the loan might "cost something." As a result of these discussions, Anthony Simeone and Walter Meisel, the Company's long-time accountant, traveled to Kramer's home with pertinent Company records in August, 1970. There, the three of them discussed the Company's financial affairs and roughed out an application for an SBA guaranty on a $180,000 loan to be made by Kramer's bank. In the course of this three hour conference, they discussed certain assets and liabilities on the Company

books which were not directly related to the wholesale potato operation. Kramer suggested that if these assets and liabilities were shown on the application, the Potato Company would not have a "good chance to get the loan" and that they should "come out." Meisel, who assumed the responsibility for preparing the application, then pencilled an abbreviated notation of the assets and liabilities that were to come out.

In the office preparation of the application and under 9(c), entitled "Surplus Analysis or Net Worth Reconciliation," in the column for "Withdrawals," Meisel entered the words "Net Assets" and the amount of $57,287 in parentheses (apparently indicating deduction from total net worth). On trial, he explained in some detail that this sum of $57,287 was arrived at by deducting the liabilities "left off" from the assets "left off," as shown on the business records of the Potato Company. These were the items which were discussed at the conference and which Kramer had suggested should come out. A list of these items was received in evidence. It showed assets of $182,299 and liabilities of $125,012, leaving a net of $57,287. Among the listed assets was a $115,200 "investment" in a dog tract and a $9,600 "investment" in Kramer's bank. The assets and liabilities left off the application submitted August 24, 1970, were also left off the supplement submitted December 14, 1970.

Meisel testified that the $57,287 was intended to be a reconciliation of the assets and liabilities shown on the application with the assets and liabilities shown on the Potato Company records. He was careful, however, to

say that he did not undertake to give an audited opinion or to verify the value or authenticity of the listed items.

There was some proof to the effect that the $115,200 dog track item was worthless and that the $9,600 "investment" in Kramer's bank was in fact a Simeone debt to the bank rather than an asset. The government suggests that if the true value of these assets had been used, the application would have shown a withdrawal of net liabilities rather than one of net assets; that the effect of the withdrawal was to exclude from the application actual liabilities by balancing them against fictitious assets.

While the application was pending, Kramer highly recommended the Potato Company's application to the processing SBA officer. There was testimony that the application was considered "marginal" and that if there had been any change in the listed assets and liabilities, it would probably have been declined.[4] After approval of the loan and authorization of disbursement on December 23, 1970, the loan funds were disbursed by Kramer's bank to the Potato Company's account in two installments—$125,000 on December 23 and $55,000 on December 28.

Meanwhile, on December 22, a $15,000 check was drawn on the Potato Company payable to Dant Slack, a potato dealer in Monte Vista, Colorado, and a creditor of the Simeones. After receiving this check in Monte Vista from Simeone, Slack cashed it on December 24, and the

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4. But see 15 U.S.C. 636(a)(1) to the effect that all SBA loans are only marginally bankable: "No financial assistance shall be extended . . . unless . . . not otherwise available on reasonable terms."

check cleared the Potato Company account when the only funds available in the account were the SBA loan proceeds. On December 28, Slack purchased a $15,000 cashier's check and on the same date sent it by airplane to Simeone in Denver. Simeone and Kramer went to the airport, picked up the check, and Simeone cashed it the same day, receiving $15,000 in $100 bills, all of which Simeone gave to Kramer. On December 29, Kramer deposited $7,000 in currency in his personal savings account at a Sterling, Colorado, bank; and on December 30, he purchased a $7,000 participation in the unguaranteed 10% of the SBA loan in a cash transaction using all $100 bills. Cross examination developed the fact that Simeone had been a participator with Kramer in the unguaranteed portion of two other loans; that Simeone had "given Mr. Kramer a lot of money over the years and that he [Kramer] put it where he thought best"; and that he expected a return of the money from Kramer.

From all the evidence, Kramer argues that the government failed to make a case. He maintains that his only participation in the preparation of the application was to discuss certain unrelated items (assets and liabilities) and to recommend that they be left out of the application; that this recommendation had the purpose and effect of causing the application to speak the truth and was in nowise false. He points to the fact that the application was made by the experienced C. P. A. Meisel who testified that it accurately represents the financial records of the Potato Company. He challenges the record for evidence to justify the inference that he agreed with anyone to make false representations as to any material fact in the application.

The $57,287 entry seems to be the heart of the government's contention that the application falsely represented the financial condition of the Potato Company. After all the discussion about it, we remain uncertain of the significance of this entry in the context of the application. As we read and understand the entry, it was carried neither as an asset nor as a liability. Meisel testified on cross-examination that it was a reconciliation of the application with the company records and that he put it under "Surplus Analysis or Net Worth Reconciliation—Withdrawals" because he "found no better place to put it." Moreover, he agreed that this treatment of the assets and liabilities was a "legitimate procedure" and that it accurately reflected the financial records of the Potato Company. It may well be that the financial records themselves were in part ficticious and that the entry was therefore deceptive. But even so, there is nothing in this record from which it can be inferred that Kramer suggested the entry or that he had anything whatsoever to do with it other than to suggest the admittedly legitimate procedure of leaving out certain items because they did not relate to the potato business.[5]

Meisel, who made the entry and vouches for its appropriateness, was neither charged with the offense nor named as a co-conspirator in this indictment. Though loan officer Biggs was named as a co-conspirator, there is no probative evidence of his knowledge or participation

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5. Apparently, it was the court's appraisal of this evidence that prompted it to direct a verdict of acquittal on the substantive charge that Kramer himself made or caused to be made false representations in the application concerning the financial condition of the Potato Company.

in the making of the application. A Mr. Bailey of the SBA actually processed the application for the guaranty. He testified that he interviewed Kramer by telephone and the Simeones in person at both their place of business and at the SBA offices; and that the Simeones were at his desk in connection with the loan application "many times." He also testified that Simeone was in the office of co-conspirator Biggs, Bailey's supervisor, several times, and we may validly assume that Simeone's visits with Biggs were in connection with the application. But there is nothing to indicate, or from which it can be inferred, that the visits were in any way sinister or conspiratorial. Certainly, there is nothing from which it can be inferred that Biggs formed or participated in an agreement of any kind. Simeone, who was produced as a government witness, testified without contradiction that he attended the conference and signed the application but he "never paid much attention to the books" and relied upon his accountant Meisel. In this posture of the case, we are unable to discern wherein on this record two or more persons agreed to knowingly make or cause to be made false statements in the application concerning the financial condition of the Potato Company.

We think, however, the evidence is entirely sufficient to support a finding that Kramer and Simeone conspired to misrepresent the purposes for which the loan proceeds were to be used; that Kramer was to receive $15,000 of the proceeds; and that it would be concealed from the SBA. The application explicitly stated that $160,000 of the loan proceeds were to be used for "Working Capital—Inventory" and the remaining $20,000 for "Acquisition

and/or Repair of Machinery and Equipment." There was direct evidence that Kramer first suggested the idea of an SBA loan guaranty and that it might "cost something"; and that he participated and counseled in the preparation of the application. As president of the lending bank and based on his participation, it is fairly inferrable that Kramer knew that the application did not contemplate that he should receive any part of the loan proceeds, and there is direct evidence that he did receive $15,000 of these proceeds. The surreptitious manner in which Kramer and Simeone consummated the transaction certainly lends credence to the government's contention that it was part of an agreement to misrepresent the intended purposes of the loan and to divert the proceeds from the purposes for which the loan was made and to conceal that fact from the SBA.

But the government was not content to rest its case on the inferences to be drawn from these facts. Slack of Monte Vista, an innocent party to the $15,000 transaction, was called to testify over hearsay objection that Simeone had told him that "he [Simeone] had to give Mr. Kramer $15,000 to get the loan." Simeone was later called as a government witness, but he was not questioned by either the prosecution or the defense concerning his alleged out-of-court declaration.

Slack's testimony was, of course, pure hearsay. Kramer strenuously contends that it was calculated to poison the minds of the jury and that it was reversibly erroneous, especially in view of the failure of the prosecution to question Simeone as to his own alleged declaration. As

hearsay, it would be clearly inadmissible in most any trial other than a conspiracy case. This tactic is reminiscent of Mr. Justice Jackson's caustic observations on hearsay evidence in conspiracy trials in his concurrence in *Krulewitch v. United States,* 336 U. S. 440, 445, 453 (1949). He characterized the crime of conspiracy as an "elastic, sprawling and pervasive offense . . . . so vague that it almost defies definition" and warned especially against the "hazard from loose application of rules of evidence" in a prosecution for this crime. We subscribe to Mr. Justice Jackson's insistence on a narrow application of the exception to the hearsay rule in cases of this kind.

We are nonetheless constrained to conclude that the exception was applied within proper bounds in our case. It is settled as an exception to the hearsay rule that statements by a co-conspirator made in furtherance of a conspiracy which has been established by competent evidence are admissible against an alleged conspirator, and the order of proof is a matter within the discretion of the trial court.[6] As we have seen, the existence of a conspiracy and Kramer's complicity are shown by direct evidence quite apart from the hearsay testimony. The jury certainly could have inferred from the oral and documentary

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6. See generally McCormick, Evidence 645 (1972); Davenport, The Confrontation Clause and the Co-conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harv. L. Rev. 1378, 1385 (1972), and cases cited therein.

evidence that the payment of loan proceeds was to be made and was in fact made to Kramer in return for his assistance in obtaining the loan. And this evidence was produced at trial before the admission of the hearsay evidence bearing on the same issue. Under these circumstances, Slack's hearsay testimony comes within the narrow bounds of the exception to the hearsay rule.

The failure of the government to inquire of Simeone concerning the truth of the hearsay statement can be justified only in terms of trial strategy, a matter within the competence of counsel and not revealed on this record. Such a tactic betrays the truth-finding function of the prosecution, and we cannot condone it. But we know of no legal or ethical rule to condemn it. And we cannot say that it was so prejudicial as to require reversal on that ground alone.

We conclude that the evidence was sufficient to justify the inference that Kramer and Simeone conspired to violate 18 U. S. C. § 1001 by falsely representing in the SBA application the purposes for which the loan guaranty was to be made. The hearsay evidence which was admitted to support the prosecution's case comes within the narrow exception for co-conspirator's declarations. In these circumstances, we cannot say that the trial court was clearly wrong in submitting the case to the jury, and we will not disturb the verdict.

The judgment is affirmed.

Order Denying Petition for Rehearing

SEPTEMBER TERM—OCTOBER 2, 1975

Before The Honorable Alfred P. Murrah, Senior Judge, The Honorable Oliver Seth and The Honorable James E. Barrett, Circuit Judges

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No. 74-1108

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

EARL L. KRAMER,

Defendant-Appellant.

This matter comes on for consideration of the appellee's motion to supplement the record and request that the Court amend its opinion, as well as the appellant's petition for rehearing.

Upon consideration whereof, it is ordered that the appellee's motion and request are denied. It is also ordered that the petition for rehearing is denied.

HOWARD K. PHILLIPS, Clerk

By: /s/ Robert L. Hoecker
Chief Deputy Clerk

SEAL

By /s/ Mary A. Sherman, Deputy Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-650

EARL L. KRAMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the prosecution's failure to ask a government witness whether he had made a hearsay statement attributed to him by another witness was inconsistent with petitioner's right of confrontation and constituted prosecutorial misconduct.

An indictment returned in the United States District Court for the District of Colorado charged petitioner with having conspired to make or cause to be made false representations in an application to the Small Business Administration (SBA), in violation of 18 U.S.C. 371.[1] More specifically, the indictment charged that in order to obtain approval of an SBA guarantee of a $180,000 loan to the Simeone Brothers Potato Company, petitioner and others

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[1]The indictment also charged petitioner with one substantive count of having made such representations, in violation of 18 U.S.C. 1001. The court dismissed the substantive count at the close of the government's case.

had conspired to misstate (a) the financial condition of the company and (b) the intended purposes of the loan.

After a jury trial, petitioner was convicted and was sentenced to fifteen months' imprisonment, to run consecutively with a sentence imposed in a separate proceeding. The court of appeals affirmed (Pet. App. A-1 to A-12).

The evidence at trial is set forth in the opinion of the court of appeals and may be summarized as follows. Petitioner was an officer of the First National Bank of Fleming, Colorado ("First National"), and a long-time friend and associate of the Simeone brothers. In early 1970, Anthony Simeone (an unindicted co-conspirator) discussed with petitioner the poor financial condition of the brothers' wholesale potato company. Simeone testified that petitioner told him that he knew someone at SBA and that he might be able to arrange an SBA guaranty for a loan from First National to Simeone (III, 246-247),[2] but that the loan "might cost something" (III, 247).

Petitioner, Simeone and Walter Meisel, the accountant for the Potato Company, met to prepare an application for an SBA guaranty on a $180,000 loan that would be made by First National. Meisel testified (II, 20) that at this meeting, petitioner suggested that certain assets and liabilities on the company books not directly related to the wholesale potato operation should be left off the loan application, or else the company would not have a "good chance to get the loan."

The application was made with the suggested deletions (II, 31-32, 124; III, 254; Govt. Exh. 1). Upon SBA's approval of the loan guaranty, First National disbursed the funds to the potato company account. Meanwhile, a check for $15,000 had been drawn on that account payable to Dant

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[2]Transcript references are to the volume and page of the record on appeal.

Slack, a potato dealer and creditor of the Simeones (Govt. Exh. 29; III, 249). Slack cashed the check two days later, and it cleared the company account when the only funds available in the account were the SBA loan proceeds.

Slack simultaneously purchased a $15,000 cashier's check which he sent to Simeone by airplane (II, 152-155). Simeone and petitioner picked up the check at the airport and cashed it the same day, receiving $15,000 in $100 bills which Simeone gave to petitioner. Petitioner then deposited $7,000 in currency in his personal savings account at a Sterling, Colorado, bank; he used another $7,000 of the funds to purchase a participation in the unguaranteed 10 percent portion of the SBA loan to Simeone, paying in $100 bills (Govt. Exhs. 18, 37, 38; II, 53-55, 80, 126-133). Simeone's loan application filed with SBA, which was signed by petitioner, had stated that $160,000 of the proceeds were to be used for "Working Capital—Inventory" and the remaining $20,000 for "Acquisition and/or Repair of Machinery and Equipment" (Govt. Exh. 40).

Called as a government witness, Dant Slack testified that in December 1970 he had discussed with Anthony Simeone a debt owed him by the Simeones. According to Slack, during that conversation Simeone told him that "he [Simeone] had to give Mr. Kramer [petitioner] $15,000 to get the loan" (II, 151). Defense counsel did not cross-examine Slack (II, 161).

Later, the government called Anthony Simeone as a witness. He testified that petitioner had discussed with him "the fact that [the SBA guaranteed] loan might cost something" (III, 247), and recounted his involvement with petitioner in sending a $15,000 check to Slack, then receiving a $15,000 cashier's check from Slack which they

cashed, after which petitioner kept the proceeds (III, 249-250). The prosecution did not ask Simeone whether he had made the statement to Slack quoted above. Neither did defense counsel ask Simeone about the statement on cross-examination.

1. Petitioner contends (Pet. 7-13) that Slack's testimony reporting Simeone's remark that he had to give petitioner $15,000 to obtain the loan was a critical piece of evidence establishing the diversion of the loan proceeds and that that testimony was improperly admitted because the prosecution called Simeone as a witness but did not ask him whether he had made the statement. Petitioner contends that (Pet. 12) "this Court should adopt a standard requiring that an available co-conspirator [here Simeone] be the only source for the introduction of hearsay statements."

However, this Court has not held that the Confrontation Clause requires that the government produce an available declarant to testify directly — and be cross-examined — regarding an out-of-court statement. Indeed, the Court implicitly rejected such a rule in *Dutton* v. *Evans*, 400 U.S. 74, 89, in which the State did not call the declarant as a witness and made no attempt to show his unavailability.

Moreover, here, the prosecution produced the declarant Simeone as a government witness and thereby made him available to the defense for cross-examination. Petitioner thus not only had the opportunity to cross-examine Slack on the factual question whether he had actually heard Simeone make the statement but to cross-examine the declarant, Simeone, as well. Thus no question of failure to produce a declarant is present.

2. Petitioner also contends (Pet. 13-15) that the prosecutor's failure to question Simeone about his statement to Slack was unethical conduct. However, the prosecutor's failure to ask Simeone about the hearsay statement when he

had called him as a witness and thereby exposed him to cross-examination was not conduct "calculated to produce a wrongful conviction" (*Berger* v. *United States*, 295 U.S. 78, 88). If in fact the prosecutor's failure to make the inquiry of Simeone bespoke his fear that Simeone "could not have substantiated the statement" (Pet. 14), then the prosecutor had equal reason to fear the defense would question Simeone about the statement on cross-examination. It is more likely that the prosecutor did not ask Simeone about the statement because in his view it was cumulative of Simeone's more damning in-court testimony regarding the "cost" of the loan and the subsequent actions of petitioner, Slack, and himself to divert a portion of the loan (see pp. 3-4, *supra*).

Petitioner has no legitimate complaint about the prosecutor's action since petitioner could have questioned the declarant and should not be allowed to reverse his own tactical choice not to avail himself of the opportunity to do so.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1976.